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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 ROBERT G. BROWN,) NO. ED CV 14-101-E
12 Plaintiff,)
13 v.) MEMORANDUM OPINION
14 CAROLYN W. COLVIN, ACTING) AND ORDER OF REMAND
15 COMMISSIONER OF SOCIAL SECURITY,)
16 Defendant.)
17

18 Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS
19 HEREBY ORDERED that Plaintiff's and Defendant's motions for summary
20 judgment are denied and this matter is remanded for further
21 administrative action consistent with this Opinion.
22

23 PROCEEDINGS
24

25 Plaintiff filed a complaint on January 15, 2014, seeking review
26 of the Commissioner's denial of disability benefits. The parties
27 filed a consent to proceed before a United States Magistrate Judge on
28 March 1, 2014. Plaintiff filed a motion for summary judgment on

1 August 1, 2014. Defendant filed a motion for summary judgment on
 2 October 2, 2014. The Court has taken the motions under submission
 3 without oral argument. See L.R. 7-15; Order, filed January 27, 2014.
 4

5 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

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 7 Plaintiff, a former fire alarm installer, asserts disability
 8 since July 17, 2009, based primarily on alleged ankylosing
 9 spondylitis¹ (Administrative Record ("A.R.") 38, 54, 124-25, 145-46).
 10 Plaintiff testified, "I have chronic pain throughout my back; lower
 11 back and upper back pain; my neck" (A.R. 40). Plaintiff claimed he
 12 could move his neck only a few degrees and also claimed his back is
 13 severely restricted in its range of motion (A.R. 40-41). Plaintiff
 14 reportedly is unable to use his hands to perform tasks for any length
 15 of time (A.R. 43). Plaintiff reportedly is often fatigued, must lie
 16 down during the day, and is "constantly out of breath" (A.R. 45-47).
 17 Plaintiff allegedly suffers these disabling symptoms despite having
 18 received medical treatments including injections with Humira,
 19 injections with steroids, injections with Toradol, and the use of
 20 prescription muscle relaxants and narcotic pain medication such as
 21 Vicodin (A.R. 161, 257-58, 297, 300, 304, 347).
 22

23 ¹ Ankylosing spondylitis is "a progressive, degenerative
 24 disease of the spine and joints which destroys cartilage and
 25 causes bones to fuse together." Liebig-Grigsby v. United States,
 26 2003 WL 1090272, at *11 (N.D. Ill. 2003); see also Campbell v.
 27 Astrue, 2011 WL 90312, at *3 n.10 (E.D. Cal. Jan. 7, 2011)
 28 ("Ankylosing spondylitis is a long-term disease that causes
 inflammation of the joints between the spinal bones, and the
 joints between the spine and pelvis. It eventually causes the
 affected spinal bones to join together") (citations and
 quotations omitted).

1 An Administrative Law Judge ("ALJ") found Plaintiff has severe
2 "ankylosing spondylosis" which renders Plaintiff "unable to perform
3 any past relevant work" (A.R. 13, 17). The ALJ also found, however,
4 that Plaintiff retains the residual functional capacity to perform
5 certain medium work, including the jobs of "kitchen helper" and
6 "assembler" (A.R. 15-19).

7
8 In deeming Plaintiff not disabled, the ALJ determined that
9 Plaintiff's testimony regarding his pain and functional limitations
10 was less than fully credible (A.R. 16-17). The ALJ stated only two
11 reasons for this credibility determination. According to the ALJ,
12 (1) Plaintiff's allegations of pain severity and functional
13 limitations "are greater than expected in light of the objective
14 [medical] evidence of record" (A.R. 17); and (2) "Although the
15 claimant has received treatment for the allegedly disabling
16 impairment, that treatment has been essentially routine and/or
17 conservative in nature. There is no record of hospital admission or
18 undergone [sic] aggressive treatment such as surgery for his back and
19 neck pain. The lack of more aggressive treatment or surgical
20 intervention suggests the claimant's symptoms and limitations were not
21 as severe as he alleged" (A.R. 16-17). The Appeals Council denied
22 review (A.R. 1-3).

23 24 STANDARD OF REVIEW

25
26 Under 42 U.S.C. section 405(g), this Court reviews the
27 Administration's decision to determine if: (1) the Administration's
28 findings are supported by substantial evidence; and (2) the

Administration used correct legal standards. See Carmickle v. Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue, 499 F.3d 1071, 1074 (9th Cir. 2007); see also Brewes v. Commissioner of Social Sec. Admin., 682 F.3d 1157, 1161 (9th Cir. 2012). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citation and quotations omitted); see Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006).

DISCUSSION

When an ALJ finds that a claimant's medically determinable impairments reasonably could be expected to cause the symptoms alleged, the ALJ may not discount the claimant's testimony regarding the severity of the symptoms without making "specific, cogent" findings, supported in the record, to justify discounting such testimony. Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995); see also Rashad v. Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990); Varney v. Secretary, 846 F.2d 581, 584 (9th Cir. 1988).² Generalized, conclusory findings do not suffice. See Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir. 2004) (the ALJ's credibility findings "must be

² In the absence of a finding of "malingered," or at least evidence of "malingered," most recent Ninth Circuit cases have applied the "clear and convincing" standard. See, e.g., Ghanim v. Colvin, 763 F.3d 1154, 1163 n.9 (9th Cir. 2014); Molina v. Astrue, 674 F.3d 1104, 1112 (9th Cir. 2012); Taylor v. Commissioner of Social Security Admin., 659 F.3d 1228, 1234 (9th Cir. 2011); Ballard v. Apfel, 2000 WL 1899797, at *2 n.1 (C.D. Cal. Dec. 19, 2000) (collecting cases). In the present case, the ALJ's findings are insufficient under either standard, so the distinction between the two standards (if any) is academic.

1 sufficiently specific to allow a reviewing court to conclude the ALJ
2 rejected the claimant's testimony on permissible grounds and did not
3 arbitrarily discredit the claimant's testimony") (internal citations
4 and quotations omitted); Holohan v. Massanari, 246 F.3d 1195, 1208
5 (9th Cir. 2001) (the ALJ must "specifically identify the testimony
6 [the ALJ] finds not to be credible and must explain what evidence
7 undermines the testimony"); Smolen v. Chater, 80 F.3d 1273, 1284 (9th
8 Cir. 1996) ("The ALJ must state specifically which symptom testimony
9 is not credible and what facts in the record lead to that
10 conclusion."); see also Social Security Ruling 96-7p.

11
12 In the present case, the ALJ found that Plaintiff's "medically
13 determinable impairment could reasonably be expected to cause the
14 alleged symptoms. . . ." (A.R. 17). The ALJ discounted the
15 credibility of Plaintiff's testimony regarding the severity of the
16 symptoms for two stated reasons: (1) the "objective [medical] evidence
17 of record"; and (2) the "essentially routine and/or conservative"
18 nature of Plaintiff's medical treatment (A.R. 16-17). These stated
19 reasons do not suffice on the present record.

20
21 A lack of objective medical evidence to support the alleged
22 severity of a claimant's symptomatology "can be a factor" in rejecting
23 a claimant's credibility, but cannot "form the sole basis." See Burch
24 v. Barnhart, 400 F.3d 676, 681 (2005). Therefore, the alleged lack of
25 supporting objective medical evidence cannot by itself justify the
26 ALJ's credibility determination in the present case. See id.

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1 A "conservative" course of treatment may sometimes properly
2 discredit a claimant's allegations of disabling symptoms. See, e.g.,
3 Parra v. Astrue, 481 F.3d 742, 750-51 (9th Cir. 2007), cert. denied,
4 552 U.S. 1141 (2008) (treatment with over-the-counter pain medication
5 is "conservative treatment" sufficient to discredit a claimant's
6 testimony regarding allegedly disabling pain). In the present case,
7 however, it is uncertain whether the ALJ accurately characterized
8 Plaintiff's treatment as "essentially routine and/or conservative in
9 nature." See, e.g., Aguilar v. Colvin, 2014 WL 3557308, at *8 (C.D.
10 Cal. July 18, 2014) ("there is evidence in the record that Plaintiff
11 has been prescribed narcotic pain medications, such as Vicodin . . .
12 It would be difficult to fault Plaintiff for overly conservative
13 treatment when he has been prescribed strong narcotic pain
14 medications"); Brunkalla-Saspa v. Colvin, 2014 WL 1095958, at *1 (C.D.
15 Cal. March 18, 2014) ("[T]he ALJ found that Plaintiff had been
16 conservatively treated with Vicodin. . . . But Vicodin qualifies as
17 strong medication to alleviate pain") (citations and quotations
18 omitted); Harrison v. Astrue, 2012 WL 527419, at *7 (D. Or. Feb. 16,
19 2012) (nerve blocks and multiple steroid injections "certainly not
20 conservative"); but see Nash v. Astrue, 2012 WL 6700582, at *9 (C.D.
21 Cal. Dec. 21, 2012) (declining to "second guess" the ALJ's
22 characterization as "routine conservative treatment" the prescribing
23 of pain medicine, muscle relaxers and Humira injections for ankylosing
24 spondylitis).

25
26 Regardless of the proper characterization of the treatment
27 Plaintiff has received, the critical question here is whether
28 substantial evidence supports the ALJ's inference that "[t]he lack of

1 more aggressive treatment or surgical intervention suggests
2 [Plaintiff's] symptoms and limitations were not as severe as he
3 alleged" (A.R. 17). On the present record, this question must be
4 answered in the negative.

5
6 The record does not contain any medical evidence that surgical
7 intervention or other "aggressive" treatment would be an appropriate
8 or effective response to Plaintiff's claimed symptomatology.
9 Plaintiff's treating rheumatologist, who opined that Plaintiff is
10 disabled, has not prescribed surgery or any other treatment Plaintiff
11 has failed to undergo (A.R. 255-56, 348-52). Neither has any other
12 physician. "A claimant cannot be discredited for failing to pursue
13 non-conservative treatment options where none exist." Devee v.
14 Colvin, 2014 WL 4220909, at *11 (D. Or. Aug. 25, 2014); see Condon v.
15 Astrue, 780 F. Supp. 2d 831, 837 (N.D. Iowa 2011) (reasoning that the
16 absence from a lengthy medical record of any recommendation for "more
17 aggressive treatment would seem to suggest no more aggressive
18 treatment options exist").

19
20 Defendant's motion cites an internet article while arguing that
21 "total joint replacement" can sometimes be a "treatment option" for
22 ankylosing spondylitis (Defendant's motion at 9 n.4). The cited
23 article, which is not part of the administrative record, indicates
24 that "[t]he most commonly replaced joints are the knee and hip." See
25 www.niams.nih.gov/Health_Info/Ankylosing_spondylitis/. Plaintiff
26 complains of shortness of breath and restrictions in the movement of
27 his neck, back and hands. "Total joint replacement" presumably would
28 not be a treatment option for any of these claimed symptoms. Even if

1 this Court could consider evidence outside the administrative record
 2 (which it cannot),³ the cited article provides no substantial evidence
 3 that "surgery for [Plaintiff's] back and neck pain" or other "more
 4 aggressive treatment" would be an appropriate or effective medical
 5 response to Plaintiff's claimed symptoms (A.R. 16-17). The above-
 6 quoted speculation of the ALJ cannot substitute for medical evidence,
 7 and the speculation cannot support the inference on which the validity
 8 of the ALJ's credibility determination depends. See Day v.
 9 Weinberger, 522 F.2d at 1156 (an ALJ who is not qualified as a medical
 10 expert cannot make "his own exploration and assessment as to [the]
 11 claimant's physical condition"); see also Rohan v. Chater, 98 F.3d
 12 966, 970-71 (7th Cir. 1996) (ALJ may not rely on his or her own lay
 13 opinion regarding medical matters); Ferguson v. Schweiker, 765 F.2d
 14 31, 37 (3d Cir. 1995) (same); cf. Rudder v. Colvin, 2014 WL 3773565,
 15 at *12 (N.D. Ill. July 30, 2014) ("The ALJ may be correct that
 16 disabling limitations from multiple sclerosis would result in more
 17 frequent treatment or need for medication. However, the ALJ must
 18 include evidence to support such a conclusion in his opinion because
 19 he is not qualified, on his own, to make such determinations")
 20 (citations and quotations omitted).

21
 22 In sum, Plaintiff's failure to receive "more aggressive treatment
 23 or surgical intervention" is an insufficient reason for discounting
 24

25 ³ Absent circumstances justifying a "sentence six"
 26 remand, the District Court is confined to a review of the
 27 evidence contained within the administrative record. See 42
 28 U.S.C. § 405(g); Mayes v. Massanari, 276 F.3d 453, 461-63 (9th
 Cir. 2001); cf. Day v. Weinberger, 522 F.2d 1154, 1156 (9th Cir.
 1975) (ALJ should not go outside the record to consult medical
 textbooks).

1 Plaintiff's credibility. See Matamoros v. Colvin, 2014 WL 1682062, at
2 *4 (C.D. Cal. April 28, 2014) ("The ALJ cannot fault [the claimant]
3 for failing to pursue non-conservative treatment options if none
4 exist") (citation omitted); Clark v. Astrue, 2013 WL 254065, at *12
5 (D. Ariz. Jan. 23, 2013) ("There is no evidence in the record that
6 Plaintiff was prescribed a TENS unit, cane, walker, wheelchair, or
7 directed to use a heating pad and thus the ALJ's speculation that
8 Plaintiff should have used those or other 'treatment modalities' is
9 not a clear and convincing reason for discounting her credibility");
10 Townson v. Astrue, 2010 WL 2077187, at *15 (D. Kan. 2010) ("[O]n this
11 record, it is speculative for the ALJ to assume that if claimant were
12 as disabled as he claims, his doctors would have ordered more
13 aggressive treatment. . . . This comment assumes that plaintiff's
14 doctors disbelieved plaintiff's pain complaints, when the record does
15 not show that they did") (citations and quotations omitted).

16
17 Because the circumstances of this case suggest that further
18 administrative review could remedy the ALJ's errors, remand is
19 appropriate. McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011); see
20 Connett v. Barnhart, 340 F.3d 871, 876 (9th Cir. 2003) ("Connett")
21 (remand is an option where the ALJ fails to state sufficient reasons
22 for rejecting a claimant's excess symptom testimony); but see Orn v.
23 Astrue, 495 F.3d 625, 640 (9th Cir. 2007) (citing Connett for the
24 proposition that "[w]hen an ALJ's reasons for rejecting the claimant's
25 testimony are legally insufficient and it is clear from the record
26 that the ALJ would be required to determine the claimant disabled if
27 he had credited the claimant's testimony, we remand for a calculation
28 of benefits") (quotations omitted); see also Ghanim v. Colvin, 763

1 F.3d at 1166 (remanding for further proceedings where the ALJ failed
 2 to state sufficient reasons for deeming a claimant's testimony not
 3 credible); Garrison v. Colvin, 759 F.3d 995, 1021 (9th Cir. 2014)
 4 (court may "remand for further proceedings, even though all conditions
 5 of the credit-as-true rule are satisfied, [when] an evaluation of the
 6 record as a whole creates serious doubt that a claimant is, in fact,
 7 disabled"); Vasquez v. Astrue, 572 F.3d 586, 600-01 (9th Cir. 2009) (a
 8 court need not "credit as true" improperly rejected claimant testimony
 9 where there are outstanding issues that must be resolved before a
 10 proper disability determination can be made); see generally INS v.
 11 Ventura, 537 U.S. 12, 16 (2002) (upon reversal of an administrative
 12 determination, the proper course is remand for additional agency
 13 investigation or explanation, except in rare circumstances).⁴

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25 ⁴ There are outstanding issues that must be resolved
 26 before a proper disability determination can be made in the
 27 present case. For example, it is not clear whether the ALJ would
 28 be required to find Plaintiff disabled for the entire claimed
 period of disability even if Plaintiff's testimony were fully
 credited. See Luna v. Astrue, 623 F.3d 1032, 1035 (9th Cir.
 2010).

1 **CONCLUSION**

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3 For all of the foregoing reasons,⁵ Plaintiff's and Defendant's

4 motions for summary judgment are denied and this matter is remanded

5 for further administrative action consistent with this Opinion.

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7 LET JUDGMENT BE ENTERED ACCORDINGLY.

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9 DATED: October 20, 2014.

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11 _____/s/_____
12 CHARLES F. EICK
13 UNITED STATES MAGISTRATE JUDGE

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25 ⁵ The Court has not reached any other issue raised by

26 Plaintiff except insofar as to determine that reversal with a

27 directive for the immediate payment of benefits would not be

28 appropriate at this time. "[E]valuation of the record as a whole

creates serious doubt that [Plaintiff] is in fact disabled."

See Garrison v. Colvin, 759 F.3d at 1021.